United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1416

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MICHAEL A. GIANNONE,

Defendant-Appellant.

B/s

Docket No. 77-1416

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- MICHAEL A. GIANNONE, Defendant-Appellant.	Docket No. 77-1416

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the sentencing court failed to take individual factors into consideration in determining appellant's sentence, relying instead on its uniform bank robbery sentence.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Henry Bramwell) rendered March 11, 1977, upon appellant's plea of guilty to an indictment charging two counts of bank robbery (18 U.S.C. §2113(a)). Appellant was sentenced to two concurrent terms of ten years' imprisonment. No application for a stay was made, and appellant is currently serving the sentence imposed.

By pro se motion dated June 2, 1977, appellant argued, inter alia, that he had not been advised of his right to appeal. Judge Bramwell, construing the motion as an application for leave to file a notice of appeal out of time, granted the application on July 27, 1977, and ordered the notice of appeal filed nunc pro tunc.

By order dated September 29, 1977, this Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant Michael A. Giannone was indicted in the Eastern District of New York for two counts of bank robbery (18 U.S.C. §2113(a)). It was alleged that, with one George O'Connor,

he committed robberies at the Citibank branch located on Queens Boulevard and the European American Bank branch located on Northern Boulevard, both in Queens, New York. The former robbery occurred on August 10, 1976, and resulted in the theft of $4,061; the latter robbery occurred on November 3, 1976, and resulted in the theft of $4,500.

On January 20, 1977, Mr. Giannone offered to plead guilty to the indictment (P.6*). After being advised of his constitutional rights, Mr. Giannone agreed that no promises as to sentence had been made, and the Government noted that the only agreement reached had been not to bring charges on an additional six bank robberies against Mr. Giannone (P.11-12). The court advised Mr. Giannone that the maximum sentence he faced was 20 years with a fine of $10,000 (P.12-13), and the plea was accepted (P.13).

At sentencing on March 11, 1977, counsel emphasized that Mr. Giannone's sole incentive for the crime in issue was the need to purchase heroin; as counsel showed, Mr. Giannone's heroin addiction had affected every aspect of his life (S.3-4). Counsel traced Mr. Giannone's involvement with drugs to a traumatic experience in Mr. Giannone's youth. His father had resorted to self-help to obtain payment on a debt and, as a result, was convicted of coercion and sentenced to a year in prison; Mr. Giannone was ostracised in his close-knit Italian

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*Minutes of the plea proceeding are addressed as "P"; minutes of the sentence proceeding are addressed as "S".

community and in close succession dropped out of school, became a discipline problem at home, and turned to drugs (S.4-5). The probation report confirms that in the last ten years Mr. Giannone's life has centered on the need for heroin, and that when Mr. Giannone's efforts to remain legitimately employed were frustrated, he turned to bank robbery for the necessary money. Notably, the probation report concludes that there was "no planning involved in any of the holdups" and finds that the weapon displayed by Mr. Giannone's associate in crime (Mr. Giannone displayed no weapon) was a toy gun (Probation Report at 3-5).

Before imposing sentence, the court made the following statement:

> The Court has taken into consideration the fact that this defendant pled guilty between August and September 1976. This defendant, together with a co-defendant, robbed eight banks of $36,600, none of which has been recovered. The defendant has four prior convictions and these offenses were related to his drug addiction.
>
> The Court has received a letter from Alfred Giannone, the father of the defendant, which the Court has read and considered together with a letter from Excelo American Industries; and a letter from Frank J. Persona, of Manhattan.
>
> (S.8-9).

The court then imposed concurrent ten-year terms of imprisonment on the two counts (S.9). The court noted that it would recommend that Mr. Giannone receive treatment for his addiction (S.9).

Counsel immediately moved for a reduction of sentence in

light of Mr. Giannone's age and the overriding influence drugs had had on his conduct (S.9-10). The court's response to this argument revealed the basis for its ten-year sentence:

> I'll tell you this. Most of those bank robbers I have are black and if you come in here you'll see that just about everyone will get the same type of sentence. I'm telling you so you know what's going on.
>
> . . .
>
> You go right ahead, you talk as long as you want, but I'm not going to change it because they're all coming through. They have all done the same thing and they're all entitled to the same sentence and I'm not going to change it.
>
> . . .
>
> I'm concerned for everyone of them, if disparity is your problem. If disparity is your problem it's going to be solved with all of them getting about the same sentence.
>
> (S.10-12).

Counsel protested that "the whole purpose of the sentencing procedure has lost meaning if uniformity is the only key that we use in that matter" (S.12). The court responded:

> Uniformity? For the record I've considered this man as an individual in connection with this sentence, and that's the way this sentence was given to this individual.
>
> . . .
>
> Counsel, you know this sentence was given to this individual because of what he did, the severity of what he did, and what he did is a problem in connection with the crime which is before the Court.
>
> . . .

> I weighed and I balanced and I looked at this particular sentence as to this individual and that was the basis of this particular sentence which I gave to him. I weighed and I balanced what the father said and what his mistakes were which created this problem. I weighed and I balanced those things, and that is the sentence I will give for this particular defendant.
>
> (S.12-13).

The court declined to reduce the sentence (S.13).

ARGUMENT

THE SENTENCING COURT FAILED TO TAKE INDIVIDUAL FACTORS INTO CONSIDERATION IN DETERMINING APPELLANT'S SENTENCE, RELYING INSTEAD ON ITS UNIFORM BANK ROBBERY SENTENCE.

The district court stated unequivocally that its sentence in this case had been determined by reference to its uniform standard for the crime alone: "They have all done the same thing and they're all entitled to the same sentence and I'm not going to change it." Despite the fact that the court had referred to having received a few letters and had mentioned a few pertinent facts before announcing sentence, it is evident from its remarks regarding its policy of imposing the same sentence that Mr. Giannone received his ten-year sentence without adequate consideration of the unique circumstances presented by his case. Moreover, the court's subsequent comments suggesting that it had "considered this man as an individual" were made only in response to counsel's challenge -- "the whole purpose of the sentencing procedure has lost meaning if uniformity is the only key that we use in that matter" -- and are an obvious effort by the district judge to justify his careless revelations which, on their face, prove the contrary.*

Mr. Giannone was entitled to an individualized evaluation for sentencing rather than a "fixed and mechanical" application

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*The minutes of the entire sentencing procedure are "C" to the separate appendix to appellant's brief.

of the district court's rule for bank robbers. United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974); see also United States v. Negron, 548 F.2d 1085, 1087 (2d Cir. 1977). In United States v. Baker, 487 F.2d 360, 361 (2d Cir. 1973), this Court found that the district court had not followed a rigid sentencing policy, but this Court used the occasion to note:

> We reaffirm our disapproval of statements by a trial judge reflecting a fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant. This applies to statements reflecting a policy of never incarcerating, as well as to a policy of always imprisoning.[*]

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*Judge Lumbard, in partial dissent, felt that the trial judge had used a uniform sentencing policy and spoke at length of the dangers and improprieties implicit in such a policy. His comments include:

> As any uniform sentencing policy is an abuse of discretion, there can be no doubt of our power to remand for the kind of consideration which it is the duty of the district judge to give in imposing sentence.
>
> . . .
>
> There is a sound basis for the requirement that the district judge individualize the defendant's sentence. The functions of criminal punishment are generally said to be specific deterrence, incapacitation, rehabilitation, general deterrence, education, and retribution [citation omitted]. Sentencing by type of crime alone would take account of only the last three purposes and would ignore the problems and capabilities of the particular defendant. The needs to deter, incapacitate, and rehabilitate a particular defendant require that sentences be individualized.
>
> . . .
>
> No single judge, or even a group of judges,

Cf. United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976) (sentence illegal if "imposed on the basis of false information or false assumptions concerning the defendant"). Thus, the ten-year sentence here in issue, although it is well within the statutory limits, may not stand; the individual receiving this sentence, Michael Giannone, played no part in its computation.

This defect is a matter of some consequence in the case at bar. Mr. Giannone entered crime exclusively through drug addiction, and he became a drug addict due to a tragic occurrence beyond his control. The court, which at one point agreed with counsel that Mr. Giannone needed treatment, promised a recommendation to the Bureau of Prisons that Mr. Giannone be

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(Footnote continued from the preceding page)

> should be permitted to impose uniform sentences for certain crimes. The decision of whether mandatory sentences are necessary for certain crimes is for Congress alone to decide.
>
> United States v. Baker, supra, 487 F.2d at 362-364.

Chief Judge Kaufman, in a separate concurring opinion, addressed the following comment to Judge Lumbard's dissent:

> My dissenting brother has taken this opportunity to express at some length his condemnation of uniform or mechanical sentencing policies, while noting with approval the goal of individualized sentencing. Were it not for the facts of this case, I would not hesitate to join in Judge Lumbard's opinion for there can be no dispute with his statement of elementary principles which are to govern every sentence.
>
> Id., 487 F.2d at 361-362.

given drug treatment. Clearly, a comprehensive drug rehabilitation program, with socialization and vocational aspects, is just the thing Mr. Giannone needs at this moment if he is ever to become a contributing member of society. Yet the court precluded Mr. Giannone from present acceptance into an institutional rehabilitation program by imposing a ten-year sentence. The guidelines for admission to the Drug Abuse Unit at the United States Penitentiary at Terre Haute, Indiana, where Mr. Giannone is incarcerated, include as a requirement a probable release date within two years; the probable release date under a ten-year sentence carries beyond this limit.* The Terre Haute program is a sophisticated and thorough approach to drug rehabilitation that incorporates extensive psychological treatment as well

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*The program description of the Drug Abuse Unit of the United States Penitentiary at Terre Haute, Indiana, published by the Bureau of Prisions, is reproduced as "D" to the separate appendix to appellant's brief. We note that similar programs at other institutions have a similar probable release date requirement, so that Mr. Giannone's transfer would have no effect on his non-eligibility. Mr. Giannone has advised appellate counsel that he has not been permitted to register for the drug abuse program at Terre Haute due to his probable release date under this sentence.

as vocational training and education programs.* This program is the very antithesis of the "treatment" Mr. Giannone is currently receiving -- abstinence; and even if drugs are not available in the institution, it is widely recognized, and borne out by Mr. Giannone's own history, that temporary unavailability of narcotics does not quell the desire for drugs.

The crime involved properly has a dominant influence on the sentence imposed, and equal protection would require that sentences for similar criminal acts not be arbitrarily disparate. Congress has allowed the district courts great leeway in determining sentence, however, and it would be wrong to conclude that bank robbery, for which the sentencing spectrum covers 20 years, must always be punished precisely with a ten-year sentence. Had the court below considered Mr. Giannone's

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*The program description shows that, after an intake and orientation program, the inmates pursue the following basic treatment approach (Appendix D, Section C):

> Therapeutic Community two level. Members advance to a semi-democratic housing unit following completion of basic instruction of Transactional Analysis, notable progress on behavioral goals, and demonstrated mature responsibility on first level of the program. Every resident is required to participate in a daily group, two evening groups per week, and monthly Marathon Therapy groups. In addition, every resident is strongly encouraged to participate in a weekly on-going therapy group. The overall goal of the program is to develop internal self-support systems. Each resident is expected to complete G.E.D. requirements, acquire VT or OJT courses if he has none. College classes are encouraged.

unique situation -- the source of his drug addiction, his sincere but frustrated efforts to obtain employment, his desire finally to break his drug habit -- it might very well have chosen a shorter sentence, one which did not have the disqualification-from-treatment effect of the ten-year sentence imposed. The court's failure to do so must be attributable to its refusal to individualize sentence and by its stated commitment to a policy of identical sentences for generically similar crimes. Under the facts at bar, strict adherence to this policy constituted a substantial deprivation.

Should this Court agree that Mr. Giannone should be resentenced, we respectfully request that the re-sentencing proceeding be directed to a different district judge, in accordance with the policy of this Court. See, e.g., United States v. Robin, supra, 545 F.2d at 782; United States v. Schwarz, supra, 500 F.2d at 1352; United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973); United States v. Brown, 470 F.2d 285, 288-289 (2d Cir. 1972).

CONCLUSION

For the foregoing reasons, this case should be remanded to the district court and assigned to a district judge other than Judge Bramwell for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

December 15, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Stanley J. Bamett